Nos. 83-812
83-929

IN THE

Supreme Court Of The United States

October Term, 1983

GEORGE C. WALLACE, Governor, et al.,
Appellants,

DOUGLAS T. SMITH, et al.,
Intervenors-Appellants,

v.

ISHMAEL JAFFREE, et al.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION TO AFFIRM

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Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the United States Court of Appeals for the Eleventh Circuit be affirmed on the grounds that the questions are so insubstantial as not to warrant further argument.

STATEMENT

After several unsuccessful attempts to get Mobile County Public School Officials to stop sponsoring prayer exercises, the Appellee, Ishmael Jaffree, filed this action on behalf of his three minor children, seeking injunctive and declaratory relief. Included as defendants were three elementary school teachers. *Jaffree v. Board of School Commissioners,* 554 F.Supp. 1104 (S.D. Ala. 1983).

Upon learning of the action against the three teachers, Fob James, then Governor of Alabama, requested the state legislature to pass a prayer law, drafted by his son, to support the "three brave teachers in Mobile".[1] In response, the state legislature enacted Senate Bill 8, 1982, Ala. Acts 82-735, codified Ala. Code Section 16-1-20.2. (Cum. Supp. 1982).[2] This statute is commonly referred to as the "James Prayer Law".

In 1978, the Alabama state legislature enacted Ala. Code Section 16-1-20 which permitted teachers to announce a period of silence for meditation.[3] Appellees did not pursue

[1]Vivian Cannon, Mobile Press Register, June 22, 1982.

[2]As enacted, Ala. Code Section 16-1-20.2 (Cum. Supp. 1982) provides:

> From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:
>
> > Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.

[3]Ala. Code Section 16-1-20 (Cum. Supp. 1982) provides:

> At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in.

a challenge to this statute. *Jaffree v. James,* 544 F.Supp. 727, 732 (S.D. Ala. 1982).

In 1981 the Alabama state legislature amended Ala. Code Section 16-1-20 to permit teachers "in all grades in all public schools" to offer "prayers" in addition to meditation during the school day. Ala. Code Section 16-1-20.1.[4] The sponsoring senator, Senator Holmes, testified that his purpose in sponsoring Section 16-1-20.1 "was to return voluntary prayer to the public schools." Id. at 731.

Appellees amended their complaint to enjoin and have declared unconstitutional both Ala. Code Section 16-1-20.2 and Section 16-1-20.1. In addition, appellees joined as party-defendants the Governor of Alabama and other state officials. R. at 92-100.

The district court severed Appellees' complaint into two actions; one involving teacher-sponsored specific prayer exercises, and the other relating to the statutorily authorized teacher-sponsored prayer exercises. R. at 282. Following the severance, the court enjoined the implementation of the prayer statutes.[5] After trial, the district court dismissed both actions and dissolved the injunction.[6] The basis of both dismissals was the failure to state a claim upon which relief could be granted. This ruling was premised upon the district court's finding that this Court had "erred in its reading of history." *Jaffree v. Board of School Commissioners, supra,* at 1128.

[4]Ala. Code Section 16-1-20.1 (Cum. Supp. 1982) provides:

> At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation *or voluntary prayer,* and during any such period no other activities shall be engaged in. (Emphasis added).

[5]*Jaffree v. James, supra.*

[6]*Jaffree v. Board of School Commissioners, supra; Jaffree v. James,* 554 F.Supp. 1130 (S.D. Ala. 1983).

Following the Eleventh Circuit's denial of an emergency motion requesting a stay and injunction, Appellees requested Justice Powell to stay the trial court's order. Justice Powell granted the stay and reinstated the injunction pending disposition in the court of appeals. *Jaffree v. Board of School Commissioners,* U.S. 103 S.Ct. 842, (1983). The court of appeals reversed the dismissal of both actions and remanded the case with instructions for the district court to enjoin the statutes and teacher sponsored prayers. *Jaffree v. Wallace,* 705 F.2d 1526 (11th Cir. 1983).

The county school board's petition for rehearing and rehearing en banc was denied by the court of appeals with four judges dissenting only from the part of the panel's decision which held the "moment of silence" statute unconstitutional. *Jaffree v. Wallace,* 713 F.2d 614 (11th Cir. 1983).

Governor Wallace filed Notice of Appeal to this Court on Sept. 21, 1983.

ARGUMENT

A. Appellants' First Question is so Insubstantial as not to Warrant a Hearing on the Merits.[7]

The first question is:

> Whether a statute enacted for the purpose of returning prayer to the public schools, and which authorizes public school teachers to reserve a minute at the beginning of the school day for silent prayer or meditation is violative of the Establishment Clause.[8]

[7]In addition to Governor Wallace, over six hundred intervenors filed their notice of appeal. *Wallace v. Jaffree,* No. 83-929. In their jurisdictional statement they raise arguments substantially similar to those of the Governor. This Motion to Affirm is therefore intended to respond to questions raised in the Intervenors' Jurisdictional Statement. This motion will additionally address arguments advanced by the Solicitor General in his Brief for the United States as Amicus Curiae.

The State of Alabama, as have twenty-one other states,[9] has legislated a moment of silence so that public school children may silently pray. To-date, the Alabama State Legislature has not invaded the providence of the general population by regulating their silent prayers as well. This case may be considered as one of those "third class of cases—silly cases" to which Justice Rehnquist was referring in his dissent in *Larkin v. Grendel's Den, Inc.,* U.S. , 103 S.Ct. 505, 512 (1982).

Appellees will concede that because legislation is "silly", useless and unnecessary it does not, because of these reasons alone, become unconstitutional. However, when legislation such as Ala. Code Section 16-1-20.1 attempts to invade the providence of the people and regulate silent prayers it runs afoul of the Establishment Clause.

This case, better than most, demonstrates the need for, and continuing vitality of the three part test first articulated by this Court in *Waltz v. Tax Commission of the City of New York,* 397 U.S. 664 (1970) and again in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). This test, simply stated, requires that any law challenged on establishment grounds must meet each of the following criteria: (1) the law must

[8]Though the statute (Ala. Code Section 16-1-20.1) refers to "voluntary prayer", the inclusion of the word "voluntary" is irrelevant. As discussed in Appellees' Brief in Opposition to Petition for a Writ of Certiorari, *Board of School Commissioners v. Jaffree,* No. 83-804, the fact that participation in a state sponsored religious activity is made voluntary will not free it from the strictures of the Establishment Clause.

The sponsorship and financial support of a church by a state will not pass muster under the Establishment Clause even if membership therein is strictly voluntary. As will be discussed infra, the Establishment Clause does not require coercion on the part of the state. *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963).

[9]See the listing provided in the Brief for the United States as Amicus Curiae at 6 note 5.

clearly reflect a secular purpose; (2) it must have a primary effect that neither advances nor inhibits religion; and (3) it must avoid excessive government entanglement with religion. *Lemon, supra* at 612-13. As will be discussed below, Alabama's silent prayer statute fails to meet all of these minimum standards.

The Solicitor General argues that the question presented is substantial because it raises the issue of "whether the Constitution prohibits neutral and non-coercive means of accommodating private religious practices in the public schools, and, by extension in other public contexts."[10] The Solicitor raises the spector that a summary affirmance by this Court will implicate a prohibition on "tax preferences for religious institutions, the allowance of religious holidays to federal employees and the enforcement of the religious accommodation requirements of Title VII of the Civil Rights Act of 1964."[11] The Solicitor over states his case. The issues raised in this case will in no way implicate the well settled areas of law referenced in the Solicitor's comment.

The gist of the Solicitor's argument in favor of the silence prayer statute is that it merely *accommodates* those students desiring to pray and "presents no threat to the values protected by the Establishment Clause. It evinces a 'benevolent neutrality' (citation omitted) in keeping with the libertarian spirit of both Religious Clauses."[12] The Solicitor's reliance on this Court's accommodation principle is misplaced.

This Court has been willing to blur the "wall of separation" to accommodate religion in certain contexts. The Court has permitted off-premises public school release time

[10]Id. at 1.
[11]Id. at 1-2.
[12]Id. at 15.

programs.[13] The Court has permitted, in limited cases, states to provide financial aid to religious colleges.[14] This Court has also allowed, upon a free speech rational, the use of state university facilities for religious activities.[15]

This Court has been far less willing to accommodate religion in the public schools. Four years prior to the court's decision in *Zorach, supra,* this Court ruled in *McCollum v. Board of Education,* 333 U.S. 203 (1948) that for outside teachers to conduct sectarian classes on public school premises violates the Establishment Clause. *Zorach* and *McCollum* are reconciled on the basis of an on-premises/off-premises distinction (i.e.; any religious activity on school premises impermissibly promotes religion, while failure to allow off-premises religious activities demonstrates hostility towards religion).

The Appellants state, and Solicitors implies, that the Free Exercise Clause requires the state to accommodate those persons desiring to pray silently.[16] The fallacy of this argument is evident on its face. Appellants confuse issues when they assume that because the Free Exercise Clause bars the state from prohibiting individual prayers, the state can necessarily *promote* such prayers through group exercise. No matter how desirable this is as a matter of policy, the Establishment Clause prohibits this objective.

Turning to the tri-parte *Lemon* test, the Appellants suggest that "(a)t a minimum the Court could modify the current three-part test."[17] For thirteen years this Court has followed the *Waltz/Lemon* test where the enactment afforded a uniform benefit to all religions. No significant

[13]*Zorach v. Clauson,* 343 U.S. 306 (1952).
[14]*Roemer v. Board of Pub. Works,* 426 U.S. 736 (1976); *Hunt v. McNair,* 413 U.S. 734 (1973); and *Tilton v. Richardson,* 403 U.S. 672 (1971).
[15]*Widmar v. Vincent,* 454 U.S. 263 (1981).
[16]See Appellants' Jurisdictional Statement at 11-15 and Brief for the United States as Amicus Curiae at 16.
[17]See Appellants' Jurisdictional Statement at 15.

problems in applying this test have emerged. The test continues to reflect current legal views and is especially suited to meet the demands of this case.

Purpose

The argument that Alabama's silent prayer statute is merely intended to "accommodate the interest of individuals of religious convictions in the public schools"[18] admits a non-secular purpose. Absent such an admission, it is clear that the purpose of Alabama's silent prayer statute was to establish a program of prayer in the public schools. The fact that Ala. Code Section 16-1-20.1 allows not only prayer, but meditation is not controlling. "It cannot be seriously argued and certainly cannot be assumed that school children can discern the nice distinctions concerning the meaning of 'meditation . . . and prayer'." *Duffy v. Las Cruces Pub. Schools,* 557 F.Supp. 1013, 1016 (D.N.M. 1983).

When the purpose of a statute cannot be discerned from its face the court should look to events surrounding the enactment of the statute. When so viewed, the non-secular purpose of Section 16-1-20.1 becomes transparent. In 1978, the Alabama legislature enacted Ala. Code Section 16-1-20. This statute permitted public school teachers in grades one through six to reserve, "at the commencement of the first class each day", a moment of silence for meditation. Arguably, this statute promoted the secular purpose of calming noisy students and providing for a period of personal introspection. Section 16-1-20 is still law and is not currently under challenge.

In 1981 the state legislature amended Section 16-1-20 in two material aspects. First, the period of silence was extended to "all grades in all public schools". Next, the activity permitted during this period of silence was augmented

[18]Brief for the United States as Amicus Curiae at 9.

to include "voluntary prayer". Ala. Code Section 16-1-20.1. Whatever conceivable secular purpose that may be claimed for the enactment of Section 16-1-20.1 was fully satisfied by its predecessor, Section 16-1-20.

While the legislative record surrounding Section 16-1-20.1 is sparce, it is undisputed that the *sole* sponsor of this statute had in mind the return of prayer to the public schools when he introduced the bill before the Alabama senate. Senator Holmes testified that in addition to returning prayer to the public schools, "(h)e intended to provide children the opportunity of sharing in their spiritual heritage of Alabama and of this country." *Jaffree v. James,* 544 F.Supp. 727 (S.D. Ala. 1982).[19]

Intent

Alabama's silent prayer statute's failure to satisfy the "purpose" part of the *Lemon* test renders it unconstitutional. *Stone v. Graham,* 449 U.S. 39 (1980). In addition to having a non-secular purpose, the statute also has a principal and primary effect of advancing religion.

As recently as last term in *Larkin v. Grendel's Den, Inc.,* U.S. 103 S.Ct. 505 (1982) this Court, with Chief Justice Burger speaking for the majority, recognized the potential for political conflict when governmental action gives even the appearance of governmental support for religion:

> . . . the mere *appearance* of a joint exercise of legislative authority by Church and State provides a significant *symbolic* benefit to religion in the minds of some by reason of the power conferred. It does not strain our prior holdings to say that the statute can be

[19]Senator Holmes' comments were also reported in the Alabama Senate Journal at 921 (1981).

seen as having a 'primary' and 'principal' effect of advancing religion. (emphasis added).

Id. at 511

When government action is directed, as here, toward young impressionable children, it becomes even more important to closely scrutinize the "symbolic" effect of that action. Because of the coercive environment of public school classrooms, a stricter separation of religion is needed in the primary and secondary schools than in other government institutions.[20] The Solicitor General candidly admits that "(t)he special character of the public school classroom necessarily heightens sensitivity to possible problems under the Religion Clauses".[21]

There are a number of factors which gives appellants' silent prayer law the appearance of sponsoring religion. The statute prescribes that the meditation or prayer period be observed at the "commencement of the first class." This time period is the usual period reserved for school prayer. The length of time alloted is one minute. One minute is approximately the time it would take to recite the Lord's Prayer. The teacher is given the discretion to announce that meditation or prayer may be observed during the silent period. The state's compulsory education machinery is used to provide the audience. The audience is composed of young impressionable children.

As implemented, Alabama's silent prayer statute will encourage those teachers in favor of school prayer to make symbolic reverent gesticulations such as bowing their heads, folding their hands and otherwise appearing in a prayful posture. Conversely, a teacher who opposes school prayer

[20]See *Widmar v. Vincent,* U.S. 102 S.Ct. 269, 276 Note 14 where this Court draws a distinction between university students (young adults) and younger students where the former is less impressionable and should be able to appreciate the University's policy of religious neutrality.

[21]Brief for the United States as Amicus Curiae at 14.

has it within her power to ensure that no students pray during the period of silence. For example, a teacher may announce that the silent period will be observed for only three seconds. This would technically comply with the statute. This teacher, of course, would be using the statute to "inhibit religion".

A teacher represents the established order in the classroom and commands respect not unlike a judge or mayor.[22] If the student perceives that the teacher intends her period of silence to be used for prayer, then the primary effect will be to advance region. The "law of imitation operates, and non-conformity is not an outstanding characteristic of children." *McCollum v. Board of Education,* 333 U.S. 203, 227 (1948).

As did the state in *Duffy v. Las Cruces Pub. Schools,* 557 F.Supp. 1013 (D. N.M. 1983), the state here has chosen to sponsor and actively involve itself in the matter of prayer. "A prayer, however, is undeniably religious and has, by its nature, both a religious purpose and effect (citation omitted). By authorizing a time for prayer in the classroom, the (appellants) have placed the imprimatur of the State on that religious activity". Id. at 1021.

Entanglement

This Court has acknowledged two distinct types of entanglements; administrative and political divisiveness. *Lemon v. Kurtzman, supra,* at 615-20, 623. The former involves government officials coming into close ongoing contact with the affairs of religious institutions. Id. at 623. It is the potential for political divisiveness generated by Alabama's silent prayer statute which causes the state to become excessively entangled with the affairs of religion.

[22]See R. Dawson, Political Socialization. 49-50 (2d ed. 1977).

This Court recognized in *McCollum v. Board of Education,* 333 U.S. 203, 231 that "(t)he public school is at once the symbol of our democracy and the most persuasive means for promoting our common destiny. In no other activity of the state is it more vital to keep out divisive forces than in its schools". The potential for political divisiveness is inherent in Alabama's silent prayer program. "(I)t is impossible for the state to promote '*all*' religions. Any activity necessarily has greater benefit to religions most suited to make use of it. As a result, not only the nonreligious, but also minority religions suffer because of their inability to enjoy the benefits of the state's religious programs."[23]

As stated above, some teachers will use the state sponsored moment of silence to advance their religious beliefs. Still others may use the time provided to inhibit or show hostility towards religious beliefs. To avoid such a result the teachers will have to be closely monitored by still other school officials. "(T)he very restrictions and surveillance necessary to ensure that teachers play a strictly non ideological role give rise to entanglements between church and state". *Lemon, supra* at 620-621.

B. Appellants' Second Question Raises an Issue that has been Clearly Resolved by this Court.

Appellants second question for review is:

> Whether Alabama's prayer law which authorizes public school teachers to lead students in audible prayers and which prescribes a prayer composed by the state violates the Establishment Clause.

[23]Seide, Daily Moments of Silence in Public Schools; A Constitutional Analysis. 58 NYUL Rev. 364, 374-75 (1983). In Note 53 Seide cites examples of groups that would not benefit from the state's silent prayer program which includes Taoist, who do not believe in a theistic God, and Moslems, who express their faith in a manner not suited by a one minute of silence.

The enactment of Ala. Code Section 16-1-20.2 (James Prayer Law) was an effort on the part of the state to encourage a prayer program in its public schools.[24] As such, it fails each of the *Lemon* test standards examined in subpart A of this brief. As observed by the Eleventh Circuit, the statute is aggravated by the existence of a government composed prayer. *Jaffree v. Wallace, supra* at 1535.

The state composed prayer of Ala. Code Section 16-1-20.2 is governed by and on all fours with *Engel v. Vitale,* 370 U.S. 421 (1962).

> The petitioners contend among other things that the state laws requiring *or permitting* use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by government as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that *in this country it is no part of the business of government to compose prayers for any group of the American People to recite as a part of a religious program carried on by government.* (emphasis added).
>
> Id. at 425.

Appellees agree with Justice Powell that "(u)nless and until this Court reconsiders (*Engel,* it appears) to control this case. *Jaffree v. Board of School Commissioners,* U.S. 103 S.Ct. 842, 843 (1983).

[24]The statute on its face states that its purpose is to give recognition "that the Lord God is one".

C. Appellants' Third and Final Question Raises Issues which have been Exhaustively Resolved by this Court.

Appellants' third question for review is:

> Whether this Court erred in its reading of history by interpreting the Constitution as prohibiting state sponsorship of public school prayers and by making the first eight amendments applicable to the states via the fourteenth amendment.

What the Intervenors, and to a lessor extent, the Appellants, are requesting of this Court is nothing short of remarkable. The Intervenors and Appellants seek to have this Court overturn over fifty five years of settled precedent and in the process reverse literally thousands of the Court's prior decisions.[25] The Intervenors are not only asking this Court to reverse prior Establishment Clause precedent by finding that the Clause only prohibit the "establishment of a national church", but, in addition, to find that none of the first eight amendments limit the states. The chaos which would result from such a ruling is self-evident.

This Court's Establishment Clause precedents have served the nation well. There is no need to re-read history based on the findings of two obscure historians and at the request of the Intervenors and Appellants. The purpose of the Establishment Clause and its applicability to the states is clear:

> The purpose of the First Amendment guarantees relating to religion were twofold: to foreclose *state* interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems. Religion and government, each insulated from the other, could then coexist. (emphasis added).
>
> *Larkin v. Grendel's Den, Inc.*, U.S. 103 S.Ct. 505, 510 (1982).

[25]This Court in *Gitlow v. New York*, 268 U.S. 606 (1952) held for the first time that the First Amendment imposed limits upon the states by virtue of the operation of the Fourteenth Amendment. Since *Gitlow* the Court has incorporated into the Fourteenth Amendment and made applicable to the states the first eight amendments. That the First Amendment applies to the state is so well founded in the Court's established precedent, that the Court rarely states the basis for considering Establishment Clause issues. See *Marsh v. Chambers*, U.S. , 103 S.Ct. 3330 (1983).

CONCLUSION

Appellants and Intervenors have presented no questions that warrant further argument. Accordingly, we respectfully submit that the judgment of the Eleventh Circuit Court of Appeals should be affirmed.

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of APPELLEES' MOTION TO AFFIRM by mail this 21st day of February, 1984, to:

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